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Issue date: 20Sep2002

Case Nos.: 2000-LHC-1812; 2000-LHC-1813

OWCP Nos.: 18-65198; 18-66576

In the Matter of:

MICHAEL T. BURT,
Claimant

v.

NATIONAL STEEL & SHIPBUILDING COMPANY,
Employer

APPEARANCES:

PIERRE VAUGHN, ESQ.,
On Behalf of the Claimant

ROY D. AXELROD, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER¹ - AWARDING MEDICAL BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (the "Act"). The claim is brought by Michael Burt, Claimant, against his former employer, National Steel & Shipbuilding Co. ("NASSCO"), Respondent. Claimant asserts that he is permanently disabled due to a neck, back, and shoulder injury sustained during his employment. In addition, Claimant asserts he sustained a back injury during his

employment in a separate incident that has permanently disabled him. A hearing was held on March 15, 2002 in San Diego, California, at which time the parties were given the opportunity to offer

¹ The following abbreviations will be used in citations to the record: CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Claimant's Exhibits Nos. 2-9; and
- 2) Respondent's Exhibits Nos. 1-23.

Upon conclusion of the hearing, the record remained open for the deposition testimony of Doctors Louis Towne and Larry Dodge and the submission of post-hearing briefs, which were timely received. The depositions of Dr. Towne and Dr. Dodge are marked as CX-8 and RX-21, respectively. In addition, the Court has accepted into evidence reports from each doctor offered post-hearing. The report of Dr. Towne is marked as CX-9, and the reports of Dr. Dodge are marked as RX-22 and 23. This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS²

The Court finds sufficient evidence to support the following stipulations:

- 1) On or about April 4, 1997, Claimant sustained an industrial injury to his back, neck, and/or his left shoulder.
- 2) Claimant was involved in a work-related incident on or about October 1, 1997.
- 3) Claimant was employed as a shipfitter for NASSCO and was involved in ship repair and construction, making him a maritime employee under § 2(3) of the Act.
- 4) Both the April 4, 1997 and October 1, 1997 incidents occurred at the NASSCO shipyard and therefore occurred on a maritime site under § 3(a) of the Act.
- 5) Notice was timely provided for the April 4, 1997 injury and October 1, 1997 incident.
- 6) Claims for the April 4, 1997 and October 1, 1997 incidents were timely filed under § 13 of the Act.
- 7) Claimant required medical treatment after each of these incidents, and medical treatment under § 7 of the Act was provided by NASSCO.
- 8) There is no claim for temporary total disability. TR. 7.
- 9) During the time Claimant worked in the Steel Trades Department, David Voigt was never asked to seek permanent modified work for Claimant. TR. 140.

² TR. 5-6, unless otherwise indicated.

- 10) Elwood Breece is not involved in any way in doing the NASSCO wage statements. TR. 171.
- 11) Joyce Gill is a qualified expert rehabilitation counselor and consultant. TR. 179.
- 12) Joyce Gill did not mail her vocational job report to Claimant; NASSCO mailed the vocational job report to Claimant. TR. 243.

ISSUES

The unresolved issues in these proceedings are:

- (1) Fact of Injury and Causation;
- (2) Nature and Extent of Disability;
- (3) Date of Maximum Medical Improvement;
- (4) Suitable Alternative Employment;
- (5) Average Weekly Wage;
- (6) Section 8(j) Obligation to Report Earnings;
- (7) Section 8(f) Special Fund Relief;
- (8) Reasonable and Necessary Medical Benefits; and
- (9) Attorney's Fees

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Michael Burt

Mr. Burt was employed by NASSCO for about 8 ½ years, with his last permanent regular position as a shipfitter. As a shipfitter, Mr. Burt was responsible for aligning units, cutting with a torch, welding, moving large amounts of steel around the yard, and ship assembly. The job requires crawling, climbing ladders, and 3 to 7 hours of bending and stooping each day. In his work, Mr. Burt

used chainfalls, come-alongs, and porta-powers to help lift heavy items.³ TR. 30-34, 96-97.

According to Mr. Burt, his full tool bag weighed about 45 lbs. Three to four times a week generally, Mr. Burt had to carry steel parts weighing about 40 lbs. each. Mr. Burt carried at least two of these steel parts at a time because he had to move stacks of 60-80 of them. While a shipfitter, Mr. Burt attended safety meetings each week and gang box meetings before each work shift, during which he was told not to lift anything by himself that he thought was too heavy and to get help if something was heavier than 45 lbs. TR. 32-33, 97-98.

On April 4, 1997, Mr. Burt was working on a box girder about 3 feet high and 45 feet long. Mr. Burt was walking across the top of the box girder when he slipped in axle grease and fell with his head going back and his feet going forward. Mr. Burt fell off the box girder onto the deck 3 feet below, striking his head and left shoulder. TR. 34-36.

Following the fall, Mr. Burt had complaints about pain to his neck, shoulder, and chest. He saw Dr. Dodge for those complaints on April 9, 1997. On that occasion, Dr. Dodge told Mr. Burt he should not return to work as a shipfitter, but could return to work under modified duty at NASSCO. TR. 37.

With respect to light duty at NASSCO, Mr. Burt worked first as a temporary material chaser for three months, wherein he delivered parts as needed to workers on the job. Next, Mr. Burt did office work for the repair yard for three months. He then worked at the Steel Trades Department for four months, helping new students when other instructors were busy. The positions he held after being injured were not permanent, and Mr. Burt was never offered reclassification to a new permanent position. TR. 38-39, 41.

Six months after the injury, Mr. Burt wanted to consult another physician to find out why he continued to have shoulder, neck, and chest pains. Mr. Burt consulted Dr. Louis Towne. After doing an MRI, Dr. Towne told Mr. Burt something wrong was found with Mr. Burt's neck but that the condition was probably not going to improve. Therefore, the situation was left as it was, and Dr. Towne sent Mr. Burt back to work at NASSCO on modified duty. TR. 37.

In addition to the April 4, 1997 incident in which Mr. Burt slipped to the deck, Mr. Burt testified about two other injuries. Mr. Burt sustained an injury to his face when he fell down a flight of stairs at NASSCO, causing him to lose his tooth and bang his head a bit. The incident occurred between October 1-10, 1997. Workers' Compensation covered the tooth repair. Mr. Burt testified that his neck was affected because he hit his face and the impact pushed his neck back, aggravating the pre-existing pain. After being read his deposition, wherein Mr. Burt stated he felt no additional pain to any part of his body as a result of the tooth incident, Mr. Burt explained, "What I'm saying is that all the pain was already on my body so I wasn't looking for none to be extra. I was trying to

³ A come-along is a chain hoist with a handle. A porta-power is a hydraulic jack for lifting heavy steel. A chainfall is a come-along without the handle. TR. 96-97.

fix what was already bleeding. My pain was already there.” Mr. Burt ultimately testified that it is fair to say the tooth incident did not have anything to do with his neck or back. TR. 49-50,100-104.

Mr. Burt testified he sustained an injury to his lower back in another incident. Mr. Burt was rolling up overhead electrical leads, walking with the cable across his shoulder. The cable got caught and gave him a whiplash-type injury, causing him pain to his lower back. TR. 50-51.

Mr. Burt saw Dr. Dodge on several occasions between April 1997 and February 2001. After being read Dr. Dodge’s October 29, 1997 report stating, “The patient states at this time, his low back is actually feeling quite well,” Mr. Burt testified that he may have said that at the time. After being read from the same report the statement, “He really does not have any significant pain,” Mr. Burt responded that he did not recall saying that. Mr. Burt explained, before his injury he was 100% healthy and so to him pain could be “something as simple as a hangnail because I’ve never really experienced pain. So if I tell [Dr. Dodge] that I’m having pain on my left side—if it was something to talk about, then it’s pain,” regardless of how Dr. Dodge rated it. TR. 63, 65-67.

After being read Dr. Dodge’s July 17, 1998 report stating, “He also denies any low back pain,” Mr. Burt was unsure whether he made that statement. He further explained that his back pain came and went and that his main concern was his neck and shoulder. TR. 75.

Mr. Burt affirmed that in February 2001, he told Dr. Dodge the only complaint he had was some soreness on the left side of his neck and left shoulder. When Mr. Burt saw Dr. Dodge in February 2001, Mr. Burt was not engaged in any strenuous physical activity, except walking several miles a day for exercise, and therefore the complaints were made at a time devoid of physical activity. TR. 64, 112.

Mr. Burt was a member of Kaiser Hospital Plan while employed at NASSCO from 1989 to April 1998 but was never seen or treated at Kaiser for his back, neck, or left shoulder. Mr. Burt has never been seen or treated by a chiropractor. Mr. Burt did not take any prescription medication from about the beginning of 1998 until January 2002. In January 2002, Mr. Burt began taking anti-inflammatory pills and ibuprofen, prescribed by the Veterans Affairs Hospital. Mr. Burt did not have medical coverage from April 1998 until January 2002, when he applied for coverage at the VA Hospital. Aside from medication, Mr. Burt last received medical treatment for his back, neck, or shoulder in 1997. TR. 40-41, 80-82, 87.

Mr. Burt had surgery on his right knee in 1987, performed by Dr. Towne. The surgery was required because his knee was injured in a car accident. Mr. Burt felt severe pain in his knee after the car accident and before the surgery. Mr. Burt was seen and treated at Mercy Hospital in 1998 for a busted lip due to a fight. Mr. Burt was fighting with his girlfriend at a bus stop when he was hit by another man. Mr. Burt threw a couple of swings at the man before the two were separated. TR. 67-68, 78-80.

Mr. Burt currently has complaints regarding the whole upper left side of his body, specifically

his neck and shoulder. There are activities that Mr. Burt used to do but no longer does because of the pain. Mr. Burt is bothered by swimming, looking both ways when crossing the street, simply by turning his head, and reaching up when he is laying on the floor or playing with his kids. According to Mr. Burt, the pain affected his ability to work. Mr. Burt testified he is not able to work as a shipfitter because of the weight restrictions placed on him and because he was not able to use any of the equipment. TR. 51-52.

Shortly after his April 4, 1997 injury, Mr. Burt took a urinalysis test in compliance with NASSCO's testing policy for all injured workers who would miss work time. The results came back positive for marijuana. Mr. Burt was told that he either join the Employee Assistance Program or be immediately terminated, so Mr. Burt joined the program. After a year with the program, during which he was frequently tested, Mr. Burt was informed his urinalysis showed a trace of alcohol. For that reason was terminated from NASSCO. Mr. Burt testified that no one ever told him he was going to be tested for alcohol when he entered the EAP program nor that he would be terminated if he tested positive for alcohol. TR. 44-46.

When he had worked at NASSCO, Mr. Burt was a member of the Ironworkers Union Local 627. Mr. Burt contacted his attorney and the Union when he was terminated. In response to whether he filed a grievance against NASSCO after the termination, Mr. Burt testified he left everything in the hands of the other people to file. TR. 75, 104-05.

Mr. Burt has not been employed since he was terminated by NASSCO. Dr. Towne had advised that Mr. Burt needed to be retrained in some light or medium type work. Therefore, Mr. Burt was not going to look for a job until he got retraining to earn a competitive wage to provide for him and his family. Subsequently, everything fell apart and so he did not look for work. He was stressed and became homeless. Mr. Burt has not been offered nor received retraining from any source. TR. 42-43.

Dr. Towne never advised Mr. Burt that he was totally disabled and could not return to work at all. Since he was last employed by NASSCO, Mr. Burt has not sought any kind of work, including light duty work. As to how he occupies his time, Mr. Burt testified he sits around, reading—that he has done nothing because he has been homeless the last 2½ years. Mr. Burt stated he did not sit at home and watch television because he did not have a home. After being read contrary testimony from his deposition, he agreed that he spent his time watching television, which continues to accurately describe how he spends his time. TR. 93-95.

Mr. Burt received workers' compensation from NASSCO in 1997. Mr. Burt disputes that NASSCO paid him \$170/week from October 27, 1997 until August 9, 1998, stating NASSCO began making such payments but stopped. TR. 90.

In December 1997, Mr. Burt met with Joyce Gill, a vocational consultant. Mr. Burt does not recall whether he told Ms. Gill he had no difficulty with bending or twisting. Mr. Burt affirms that he told Ms. Gill he had no difficulty with standing, walking, sitting, climbing, kneeling, squatting, stooping, and grasping. TR. 53, 55, 58-59.

Mr. Burt testified there was a strike for about ten weeks at NASSCO between April 4, 1996 and April 4, 1997. The strike was not a complete one that shut down NASSCO because only some of the unions decided to strike. Mr. Burt was on strike for eight weeks. His wage statements reflect no earnings from July 21, 1996 until the pay period ending September 22, 1996. His earnings resume on a regular basis on October 6, 1996. Mr. Burt normally worked throughout the year and received three weeks of vacation a year. TR. 44, 265-267.

David Voigt

Mr. Voigt is currently Manager of Steel Trades Training and Trades Administrator for Steel Trades at NASSCO. Mr. Voigt has been employed by NASSCO for about 38 years and has held his current position for about 12 years. As Manager of Steel Trades Training, Mr. Voigt is responsible for the training of shipfitters and welders and the development of training material. As Trades Administrator, Mr. Voigt is involved in placing employees, including light-duty employees and injured employees in permanent modified duty. TR. 115-16.

Among other positions at NASSCO, Mr. Voigt worked as a shipfitter helper for about one year and as a shipfitter for about four years. Mr. Voigt is familiar with the job duties of a shipfitter at NASSCO from his years as a shipfitter, his training of shipfitters, and his involvement in developing the curriculum used in the training. TR. 116-17.

Mr. Voigt testified a normal tool bag for a NASSCO shipfitter weighs 20-25 lbs. NASSCO has gang boxes, a metal lock-in box, that stores an employee's personal tools. The normal procedure at NASSCO is if an employee needs a tool that he is not carrying, the employee would get the tool from the gang box, making it unnecessary for an employee to carry everything with him all the time. TR. 118-20.

After being shown the RU-91 employee job description describing the normal job duties for a shipfitter at NASSCO, RX-10, Mr. Voigt agreed that the document accurately described the normal physical duties of a shipfitter at NASSCO and was signed by him. Mr. Voigt testified that shipfitters at NASSCO are not normally required to lift over 50 lbs. by themselves. Shipfitters are frequently told at safety and gang box meetings that they should not lift anything more than 45 lbs and that they should get assistance if they need help. There are mechanical devices available for use by shipfitters to lift heavy items, including overhead cranes, forklifts, pallet jacks, come-alongs, and porta-powers. TR. 120-22.

NASSCO policy called for exploring permanent modified duty for Mr. Burt if Mr. Burt had not been terminated for violating the EAP Program in April 1998. NASSCO explores opportunities to place every injured employee, but work restrictions for some employees are so extreme that they cannot be placed in permanent modified duty. TR. 124, 132-34.

There was no strike at NASSCO in 1996, and specifically no strike for ten weeks. The last strike occurred in 1991 or 1992. He testified he knows the last strike was in 1992 because that is the year NASSCO's old contract expired causing the strike, because he is in charge of manpower and would be aware of a shortage in manpower, and because salaried supervisors do the work when there is a strike and that was the last time he had to do the work. TR. 125-28.

Elwood J. Breece, Jr.

Mr. Breece is the Assistant Manager of Hourly Employment at NASSCO. Mr. Breece is responsible for all the hourly hiring, enforces the company's policies and rules, administers discipline as necessary, and is involved regularly in employee discharge at NASSCO. He has been employed by NASSCO for about 34 years and has held his current position for about 26 to 27 years. Mr. Breece worked at NASSCO as a shipfitter for about 4 years, became a supervisor for shipfitters for 2 years, and became an instructor of shipfitters for the Steel Trades Department for about 1 year. TR. 146-48.

Mr. Breece is familiar with the job duties of a shipfitter at NASSCO because he performed those duties, supervised shipfitters, and taught shipfitters. Mr. Breece currently observes shipfitters at NASSCO. A normal tool bag for shipfitters weighs 20-25 lbs. There is no reason a shipfitter would normally carry a 45 lb. tool bag because one normally only carries the tools needed for that day, putting the rest in gang boxes. TR. 148, 155.

He testified there are many devices available to shipfitters to assist with heavy lifting and carrying of items, such as come-alongs, porta-powers, chainfalls, forklifts, pallet lifts, overhead cranes. NASSCO employees are advised that they should seek assistance from other employees if the physical task is too much for them in their opinion. Mr. Breece was shown the RU-91, and Mr. Breece agreed that the document accurately described the duties of a shipfitter. Mr. Breece testified shipfitters at NASSCO are evaluated on how much work they can accomplish, and this rating determines who will be laid off first. TR. 148, 152-55, 157-58.

The Employee Assistance Program at NASSCO was put together to assist employees who have issues in safety and performance. If a person has tested positive for drug use, then that person is given the option of being terminated or entering a rehabilitation program. Mr. Burt was placed in the EAP in April 1997 for substance abuse after he tested positive for marijuana. Mr. Burt was terminated in April 1998 after testing positive for alcohol. TR. 149-50.

NASSCO had collective bargaining agreements with its unions in April 1998, including Iron

Workers 627, a steel trades union applicable to Mr. Burt. Under the collective bargaining agreement applicable to Mr. Burt, Mr. Burt could have filed a grievance against NASSCO disputing his termination, but he did not. TR. 150-51.

NASSCO places injured employees in permanent modified duty positions, but NASSCO never placed Mr. Burt in permanent modified duty work because he was terminated before that point in the process. TR. 152.

Mr. Breece does not recall a strike at NASSCO in 1996. He believes some sort of job action took place in 1994. He testified the action occurred after the last contract ended. Some of the trades went on strike in 1994, Mr. Breece believes. There was an unfair labor practice charge against NASSCO and as a result some of the trades were permitted to go out on strike and some did so. TR. 174-76.

Menna Dinka

Ms. Dinka is a Workers' Compensation Analyst at NASSCO, and has been employed there for about 1½ years. Ms. Dinka administers workers' compensation claims. Ms. Dinka first became responsible for administering the workers' compensation claim of Mr. Burt in June 2001. Mr. Burt was to be paid \$6,970 at \$170/week from October 27, 1997 to August 9, 1998. Ms. Dinka has independently confirmed that the payments were made to Mr. Burt. TR. 256-58.

A cover letter dated June 28, 2001 and an LS-200 was sent to Mr. Burt and Mr. Burt's attorney. Ms. Dinka requested Mr. Burt's earnings from January 2001 to the present. Ms. Dinka never received an updated LS-200 form from Mr. Burt nor Mr. Burt's attorney. The letter that was sent to Mr. Burt was returned as undeliverable, and the copy sent to his attorney was never returned. TR. 260-63.

II. MEDICAL EVIDENCE: Depositions and Reports

Louis C. Towne, M.D.⁴

Dr. Towne is a QME,⁵ IME, and AME evaluator and has done general orthopedics for 31 years. He is licensed in the State of California and is board certified. Dr. Towne decided 2 years ago to semi-retire after 30 years in practice. Dr. Towne currently assists on neck and back surgeries, last having

⁴ The records of Dr. Towne are reproduced as CX-3, CX-9, and RX-15. These records will be cited to the extent they differ from or add to Dr. Towne's testimony.

⁵ A qualified medical evaluator under California's Workers' Compensation Act.

performed back surgeries as the primary surgeon 3 to 4 years ago. Dr. Towne does not currently perform neck surgeries as the primary surgeon, last having done so during his residency over 31 years ago. He has performed a neck surgery as a non-primary surgeon within the past year. CX-8, p. 5, 17-18.

Dr. Towne does not have a clinical practice where he treats patients not involved in workers' compensation or litigation. His current practice consists of medical-legal evaluations and assisting in surgeries for workers' compensation and personal injury patients, which generally involve litigation. Of Dr. Towne's QME evaluations, 90% are for the plaintiff and 10% are for the defense. CX-8, p. 18-19.

Dr. Towne's current practice deals with everything from head to toe. Dr. Towne has never been involved or participated in a spinal fellowship, a period of time in which an individual does specific work and surgery in an area of concern. CX-8, p. 19-20.

Dr. Towne saw Mr. Burt four times: September 9, 1997, December 22, 1998, April 14, 1998 and February 20, 2002. Dr. Towne testified that he felt Mr. Burt's cervical condition was permanent and stationary in October 1997 and that Mr. Burt is not totally disabled. Dr. Towne agrees with Dr. Dodge's finding that Mr. Burt's neurological exams are normal. Dr. Towne disagrees with Dr. Dodge's finding that Mr. Burt is not a qualified injured worker because Mr. Burt has obvious changes in his neck based on an MRI and still has residual posterior neck pain with radiation into his left upper trapezius muscle. CX-8, p. 6, 14-15, 23, 31, 35-36.

Dr. Towne is aware of studies showing the general population exhibits disc bulges on MRI scans without symptoms, but is not cognizant of the actual percentage of the population that does so. Dr. Towne testified that in Mr. Burt's case, the patient has residual pain in addition to disc bulges. CX-8, p. 21-23.

Spondylosis is commonly known as arthritis and can be developmental, traumatic, congenital, and progressive. Dr. Towne testified that Mr. Burt probably had spondylosis before April 1997 and the condition was aggravated by Mr. Burt's April 4, 1997 injury. Dr. Towne opines Mr. Burt's cervical complaints are all tied to his industrial injury. CX-8, p. 26-29, 44.

Because of the presence of multilevel mild to moderate cervical spondylosis and pain with range of motion in his neck, Mr. Burt is precluded by his April 4, 1997 injury from performing his customary and usual duties as a shipfitter at NASSCO. This condition puts Mr. Burt in a position where he could be a danger to himself and the people around him if he returned to work as a shipfitter at NASSCO because Mr. Burt may drop whatever he is working on or with if pain occurs in his neck. CX-8, p. 11-12.

Dr. Towne has been to the NASSCO shipyard as a visitor but never during work hours. He has never observed shipfitters at NASSCO. Prior to the month before his deposition was taken, Dr. Towne had never reviewed an RU-91 job description for the job of a shipfitter with respect to Mr.

Burt. Dr. Towne has never reviewed a position description for a shipfitter nor a job analysis for a shipfitter at NASSCO. Dr. Towne relied on Mr. Burt's description of his job duties. CX-8, p. 20-21, 38.

Dr. Towne testified that based on the RU-91's description of shipfitting activities at NASSCO, Mr. Burt would be precluded from doing that job due to his April 4, 1997 injury because of the requirement of neck bending for 3-6 hours and the weight requirements. Frequent neck bending or twisting could aggravate the injury by causing disc herniation and irritation of the surrounding nerves. CX-8, p. 12-14.

On February 20, 2002, Dr. Towne did a supplemental report that incorporates his opinions and treatments regarding Mr. Burt's disability. Dr. Towne physically examined Mr. Burt's neck and upper extremities. Dr. Towne's opinion on February 20, 2002 was that Mr. Burt was precluded from repetitive motions of the neck, which contemplated that Mr. Burt had lost approximately 50% of his pre-injury capacity for flexing, extending, bending, and rotating his neck. Dr. Towne opined that Mr. Burt may require analgesic and/or anti-inflammatory medications as his symptoms require and should be afforded physical therapy and/or chiropractic treatment for flareups of neck pain. CX-8, p. 6-7; 9-11; CX-9.

Dr. Towne did not previously review Joyce Gill's vocational report for Mr. Burt. With respect to the report, Dr. Towne did not know what part of the body was being referred to when Mr. Burt was asked about bending or twisting. Dr. Towne testified that otherwise Mr. Burt's answers in Ms. Gill's report are consistent with the information he gave Dr. Towne. CX-8, p. 31-35.

Mr. Burt never complained to Dr. Towne about lower back pain. Dr. Towne testified that Mr. Burt does not have disability in lower back. CX-8, p. 40.

Larry D. Dodge, M.D.⁶

Dr. Dodge has been a board certified in orthopedic surgeon since 1988. About 95% of his current private practice deals with neck and back injuries, and he does about 400 spine operations a year. Thirty to forty percent of his cases deal with patients not involved in litigation, and 60 to 70% are workers' compensation cases in which the patients do not have attorneys. Seven to eight percent of his practice is as a QME. In terms of his medical-legal evaluations, 80% is for the defense, 10% is for applicant, and 10% is as an agreed medical examiner. RX-21, p. 6-9.

Dr. Dodge gets one or two referrals a week from NASSCO regarding back and neck injuries, with 75-85% of those referrals for treatment. Dr. Dodge has been to NASSCO shipyard and observed shipfitters. He has also reviewed job analyses for shipfitters at NASSCO. RX-21, p. 28, 42-43.

⁶ The records of Dr. Dodge are reproduced as RX-11 to 14 and RX-22 and 23. These records will be cited to the extent they differ from or add to Dr. Dodge's testimony.

Dr. Dodge has examined Mr. Burt nine times between April 1997 and February 2001, doing a clinical exam each time. With respect to the MRI of Mr. Burt's cervical spine, Dr. Dodge testified that the results revealed some mild degenerative disc disease and bulging. The condition was not impinging against the nerve or spinal cord, and is not clinically significant because it is a common finding among individuals in Mr. Burt's age range. Studies have shown that about 30% of people in their 30's and about 40% of people in their 40's exhibit non-symptomatic disc bulges on an MRI scan. RX-21, p. 11-12, 20, 36-37.

Dr. Dodge testified he sees more or just as many cases of arthritis of the spine as any physician in San Diego. Mr. Burt has spondylosis which can cause pain and discomfort, but the pain usually is not longstanding disabling pain. Spondylosis is a condition that can be made worse by trauma, and Mr. Burt probably had condition before April 1997. The condition may flare due to trauma but should go back down. Mr. Burt had a type of arthritis everyone gets, and trauma similar to Mr. Burt's fall on April 4, 1997 probably did not worsen the condition. RX-21, p. 64, 67-68, 84.

Dr. Dodge disagrees with Dr. Towne's conclusions regarding the possibility of disc herniation for Mr. Burt, stating that the possibility of Mr. Burt herniating the disc in his neck is not much greater than the general population. Dr. Dodge testified there is probably less than a one percent chance that the disc would herniate to the point where an operation is required. RX-21, p. 34.

Dr. Dodge disagrees with Dr. Towne's opinion that Mr. Burt runs the risk of injuring himself or someone around him if he returns to work as a shipfitter at NASSCO. Dr. Dodge testified that it is possible but not reasonably medically probable that Mr. Burt would re-injure his cervical spine if he returned to work at NASSCO as a shipfitter. RX-21, p. 34-35.

Dr. Dodge testified that Mr. Burt is not precluded permanently from heavy work because Mr. Burt never had any neurological symptoms, has undergone diagnostic tests including x-rays that have been normal, only has a mild bulge of his disc without impingement against a nerve, and has had normal physical exams after his initial exams. Mr. Burt has no disability in his spine based on the fact that there are no objective findings other than mild degenerative disc disease, which is very common in someone Mr. Burt's age. Dr. Dodge testified that muscle spasms are objective findings of injury and that he observed a muscle spasm with Mr. Burt in August 1997. RX-12, p. 40; RX-21, p. 24-25, 31-32, 53-55.

Dr. Dodge opined that Mr. Burt suffered an injury at work that caused him a disability at least for some period of time. Dr. Dodge testified that Mr. Burt was permanent and stationary in his lower back on October 29, 1997. Dr. Dodge testified that Mr. Burt was permanent and stationary on October 29, 1997 with respect to his cervical condition based on Dr. Towne's similar finding, the fact that six months had passed since the injury occurred, that Mr. Burt had received physical therapy and medication, and that there was essentially nothing else that could be offered to Mr. Burt, aside from supportive care such as anti-inflammatory type medication. RX-21, p. 51, 55-56.

With respect to Ms. Gill's report, Dr. Dodge testified that if Mr. Burt had neck and cervical spine problems, then bending, twisting, climbing, and similar movements should have been difficult

for him. There is no reason Mr. Burt could not be pest control technician, warehouse worker, or security guard. RX-21, p. 26-29.

III. VOCATIONAL EVIDENCE: Testimony and Report

Joyce Gill: J.G. Gill & Associates

Ms. Gill is the President of J.B. Gill & Associates and serves as a certified rehabilitation counselor and consultant. She considers herself an expert in the San Diego labor market based on the fact that she has worked in the San Diego labor market on a daily basis since 1983 contacting employers and investigating employment situations for injured workers. TR. 178, 181.

A position description is an informal, generic description of a position's responsibilities in broad detail. Position descriptions can be obtained from interviews with individuals regarding what is involved in a job and from government information. A job analysis is a written document that outlines the physical demands, requirements, and responsibilities of a specific job. A job analysis is performed on-site with the injured worker or an individual who was performing that job and usually involves supervisory personnel who are intimately familiar with the job. A job analysis is for a specific job and is very detailed compared to a position description. TR. 181-82, 207-208.

Ms. Gill has performed a position description for the job of a shipfitter at least 2-4 times a month since 1988. Ms. Gill has performed a job analysis for the position of shipfitter at NASSCO about 2 to 4 times a year for the past 10 years. Ms. Gill visits the NASSCO shipyard several times a year and has observed shipfitters 2 to 4 times a year for the past ten years. Ms. Gill interviews shipfitters in preparation for a position description or job analysis 3 to 4 times a month. Ms. Gill interviews foreman or foreman supervisors of shipfitters at NASSCO to obtain information about shipfitting at NASSCO about 2 to 4 times a year. The RU-91 employee job description accurately describes the job duties of a shipfitter at NASSCO, based on her knowledge and experience. TR. 182-85.

Ms. Gill interviewed Mr. Burt on December 23, 1997, the basis for her January 14, 1998 report. Mr. Burt told Ms. Gill about his physical limitations, education background, and employment history. Ms. Gill reviewed medical reports regarding Mr. Burt from Dr. Towne and Dr. Dodge as well as Mr. Burt's personnel records from NASSCO. In exploring alternate suitable employment for Mr. Burt, Ms. Gill assumed Mr. Burt had work restrictions as outlined by Dr. Towne, namely a preclusion from "heavy work." TR. 187-190, 192-93, 195.

Ms. Gill defined "heavy work" in Dr. Towne's report by referring to the Dictionary of Occupational Titles from the U.S. Department of Labor and the definition from the Workers' Compensation Laws of California. Ms. Gill did not know whether Dr. Towne's "heavy work" restriction is based on the state or federal definition. TR. 214-15.

Ms. Gill testified the Workers' Compensation Laws of California defines a disability

precluding heavy work as: “Thirty percent, contemplates the individual has lost approximately ½ of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, or climbing, or other activities involving comparable physical effort.” She testified the U.S. Department of Labor’s definition of heavy work is: exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 lbs of force frequently, and/or 10 to 20 lbs of force constantly to move objects. TR. 216-17.

Ms. Gill testified that Mr. Burt should be able to perform his duties as a shipfitter at NASSCO even with Dr. Towne’s work restrictions, based on the physical demands of the job. Ms. Gill took into account several things in making her determination that Mr. Burt could return to his job as a shipfitter: information from the physicians, the specific job being performed by the individual, the information from the U.S. Department of Labor in the *Dictionary of Occupational Titles*, and available position descriptions and job analyses. TR. 196, 215-16.

Based on Ms. Gill’s interview with Mr. Burt and Ms. Gill’s review of the records, Ms. Gill performed a transferrable skills analysis, an outline of the worker trades that an individual can perform based on the individual’s previous occupations, education, work history, and physical restrictions/limitations. Ms. Gill identified three different occupations available to Mr. Burt: pest control technician, warehouse worker, and security guard. TR. 191-93.

Ms. Gill focused on those occupations because those occupations involved a worker profile that was similar to what Mr. Burt had demonstrated, were available in the job market, and were within the work restrictions of Dr. Towne. Employers provide on-the-job training for all three of these occupations. TR. 193-94, 199, 206.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court’s observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The “true doubt” rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129,

131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker" Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, Mr. Burt was employed as a shipfitter for NASSCO and was involved in ship repair and construction. TR. 5, 30-31. Therefore, the Court finds that Mr. Burt is a maritime employee under § 2(3) of the Act. In addition, both the incidents at issue, on April 4, 1997 and October 1, 1997, occurred at the NASSCO shipyard, and therefore occurred on a maritime site under § 3(a) of the Act. TR. 5, 34-35, 50-51; RX-1, p. 1-2. Because Mr. Burt has fulfilled both the status requirement under § 2(3) of the Act and the situs requirement under § 3(a) of the Act, jurisdiction is established for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990).

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out

of or in the course of employment.” 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

Mr. Burt contends he was injured on two separate occasions.⁷ First, on April 4, 1997, Mr. Burt was working on a box girder when he slipped and fell onto the deck three feet below, striking his head and left shoulder. TR. 34-36. The parties have stipulated that due to this incident Mr. Burt sustained an industrial injury to his back, neck, and/or his left shoulder. TR. 5. Their stipulation is supported by NASSCO’s medical records. RX-1, p. 1. Therefore, with respect to the April 4, 1997 incident, there is no issue concerning whether Mr. Burt was injured and whether that injury was caused by his employment at NASSCO.

The second incident occurred on or about October 1, 1997. Mr. Burt testified that he was rolling up electrical leads when the cable got caught, causing pain to his lower back. TR. 50. NASSCO does not contest that this incident occurred nor that the incident was work-related. TR. 5. However, NASSCO does contest whether this incident caused an injury to Mr. Burt. TR. 5. Here, NASSCO’s own medical records document that Mr. Burt was seen and treated for back pain in connection with the October 1, 1997 incident. RX-1, p. 2. Furthermore, the October 29, 1997 medical report of Dr. Dodge, who testified on behalf of NASSCO, indicates that Mr. Burt experienced lower back pain in connection with the cable incident. RX-12, p. 42. Given Mr. Burt’s testimony and the documentary corroboration, the Court finds that Mr. Burt was injured in a work-related accident with respect to his lower back on October 1, 1997.⁸

NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, “incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment.” 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America,

⁷ Mr. Burt testified about a third incident in which he fell down stairs, causing him to lose his tooth. TR. 49-50. Any injury involving that incident is not before the Court. Furthermore, Mr. Burt testified that the tooth incident has been resolved and ultimately that the incident had nothing to do with his neck or back pain. TR. 49-50, 102-104.

⁸ In addition to his lower back, Mr. Burt’s LS-203 for the October 1, 1997 cable incident lists injuries to his neck and shoulders. RX-2, p. 4. Mr. Burt presented no evidence, and the Court finds no evidence indicating that Mr. Burt’s neck and shoulders were injured in the October 1, 1997 incident.

25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

Credibility of Claimant

The evaluation of witnesses' credibility, including that of medical witnesses, is for the trier of fact. Darcell v. FMC Corp., 14 BRBS 294, 296 (1981). As previously stated, the Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating Mr. Burt's testimony, the Court finds his testimony is not credible and should not be given much weight. His testimony contained numerous inconsistencies and exaggerations, most importantly concerning his job duties and the extent of his injuries.

For example, Mr. Burt testified at the hearing that while working as a shipfitter at NASSCO, his full tool bag weighed about 45 lbs. TR. 32. However, in his deposition Mr. Burt testified that his tool bag probably weighed about 65 to 70 lbs. RX-20, p. 83. Furthermore, Mr. Burt's testimony about his tool bag was contradicted by two of NASSCO's witnesses, whom the Court found more convincing. David Voigt, the Manager of Steel Trades Training and Trades Administer for Steel Trades at NASSCO, testified that he was familiar with the job duties of a shipfitter at NASSCO from working as a shipfitter and from training shipfitters. TR. 117. Mr. Voigt testified that a normal tool

bag for weighs 20-25 lbs. TR. 119. Elwood Breece, the Assistant Manager of Hourly Employment at NASSCO, testified that he is familiar with the job duties of a shipfitter because he worked as a shipfitter, supervised shipfitters, and taught shipfitters. TR. 148. Mr. Breece testified that a normal tool bag for a NASSCO shipfitter weighs 20-25 lbs. and that there is no reason a shipfitter would normally carry a 45 lb. tool bag because one normally carries only the tools one needs for that day, putting the remaining tools in the gang box. TR. 155.

Mr. Burt also testified that as part of his job, he moved 40 lb. steel parts generally 3 to 4 times a week. TR. 33. Mr. Burt testified that he carried at least two of these steel parts at a time because he had to move stacks of 60 to 80 of them. Id. On cross-examination, however, Mr. Burt testified that as a shipfitter he had various devices, such as chainfalls, come-alongs, and porta-powers, to help lift heavy items. TR. 96-97. He also testified that NASSCO regularly told its shipfitters not to lift anything they thought was too heavy and to get help if something were heavier than 45 lbs. TR. 97-98. Both Mr. Voigt and Mr. Breece's testimony corroborate the fact that Mr. Burt had devices to help lift heavy items and that NASSCO frequently told its shipfitters not to lift anything alone that they thought was too heavy. TR. 121, 154-55. Given the testimony above, the Court finds Mr. Burt's description of the weight requirements of his job exaggerated and self-serving.

Mr. Burt's testimony regarding the extent of his injuries also lacks credibility. For instance, Mr. Burt was confronted with Dr. Dodge's October 29, 1997 report stating, "The patient states at this time, his low back is actually feeling quite well. He really does not have any significant pain." TR. 65-66. Mr. Burt testified he did not recall making those statements. Id. He then went on to explain that, before his injury he was 100% healthy and so to him pain could be "something as simple as a hangnail because I've never really experienced pain. So if I tell [Dr. Dodge] that I'm having pain on my left side—if it was something to talk about, then it's pain," regardless of how Dr. Dodge rated it. TR. 67. Mr. Burt's explanation that he "never really experienced pain" is contradicted by his testimony that prior to April 1997 he felt severe pain in his knee after a car accident, requiring surgery. TR. 68.

With respect to falling down a flight of stairs and losing his tooth, Mr. Burt testified at the hearing initially that his neck was affected because he hit his face and the impact pushed his neck back, aggravating the pre-existing pain. TR 100-01. After being read his deposition, wherein Mr. Burt stated he felt no additional pain to any part of his body as a result of the tooth incident, Mr. Burt explained, "What I'm saying is that all the pain was already on my body so I wasn't looking for none to be extra. I was trying to fix what was already bleeding. My pain was already there." TR. 102. After being refreshed further from his deposition wherein he stated he did not tell Dr. Towne about the tooth incident because, "it was a dental incident. It didn't have anything to do with my neck or back," Mr. Burt ultimately testified that it is fair to say the tooth incident did not have anything to do with his neck or back. TR. 103-04. Although the tooth incident is not relevant to this case in a substantive manner, the Court finds this exchange revealing as to the accuracy and veracity of Mr. Burt's testimony.

Also, Mr. Burt's description of his injuries is inconsistent with the information he provided to Joyce Gill in preparation of her vocational report in December 1997. The report indicates Mr. Burt reported no difficulty with bending/twisting, standing, walking, sitting, climbing stairs and ladders, kneeling, and squatting/stooping, among other things. RX-18, p. 133-34. Dr. Dodge testified that an individual with problems in his/her neck should have difficulty with bending, twisting, climbing, and similar movements because the individual would have to extend, flex, and twist his/her head and neck repeatedly in performing work in those body positions. RX-21, p. 27-28.

Since being fired from NASSCO in April 1998, Mr. Burt has not looked for any work, including light duty work. TR. 93. When asked whether he spent his time watching television, Mr. Burt responded he became homeless and has done nothing; he did not watch television because he did not have a home. TR. 94. However, after he was read deposition testimony indicating he watched television, he conceded that he currently spends his time watching television. TR. 95. Also, Mr. Burt's testimony that he has pain from turning his head and reaching with his arm is inconsistent with his testimony that he was in a fight in 1998 during which he sustained a busted lip and took swings at his opponent. TR. 51-52, 78-80.

Mr. Burt also testified he did not take any prescription medication from 1998 until January 2002. TR. 82. He did not have medical coverage during that time. TR. 82, 111. He received medical coverage after applying for it with Veterans Affairs in January 2002, at which time he received and began taking anti-inflammatory and pain medication. TR. 81-82, 111-12. Aside from medication, Mr. Burt last received medical treatment for his back, neck, or shoulder in 1997. TR. 87. Mr. Burt has never been seen or treated by a chiropractor. TR. 81. If Mr. Burt were indeed in the disabling pain he describes, the Court finds it difficult to believe he did not apply for medical coverage sooner than he did, could go so long without prescription medication for the pain, and was not treated in any way, aside from medication, since 1997. After reviewing the entirety of Mr. Burt's testimony and having considered it in light of all the other evidence, the Court finds Mr. Burt's testimony is not credible and should be afforded little evidentiary value.

Temporary Disability

After his injury on April 4, 1997, Mr. Burt worked modified light duty at NASSCO until he was terminated in April 1998. TR. 37-38, 93. According to the medical experts in this case, Mr. Burt's work-related injuries arising from both the April 4, 1997 and October 1, 1997 incidents were permanent and stable in October 1997. CX-3, p.8; CX-8, p. 31; CX-9, p. 2; RX-12, p. 45; RX-15, p. 68; RX-21, p. 16-18, 55. Therefore, NASSCO provided Mr. Burt with light-duty work from the time he was first injured until all his injuries reached maximum medical improvement and became permanent. Mr. Burt has presented no evidence of any wage loss while he was employed on light duty, and his wage statements do not indicate any such wage loss. CX-5, pp. 10-32. Therefore, the Court finds that Mr. Burt did not suffer an economic loss during the period before his injuries became permanent and is not entitled to any temporary disability benefits in connection with his April 4, 1997 and October 1, 1997 injuries.

Permanent Disability for the October 1, 1997 Incident

With respect to the issue of permanent disability, Mr. Burt's lower back injury of October 1, 1997 presents a clearer legal resolution and will be evaluated first. Dr. Dodge, on behalf of NASSCO, testified that Mr. Burt's date of maximum medical improvement for this injury was October 29, 1997. RX-12, p. 45; RX-21, p. 16. The Court finds Mr. Burt's lower back injury since that date has fully resolved itself, and Mr. Burt is not entitled to any permanent disability benefits for his lower back injury of October 1, 1997.

The evidence fully supports such a finding. According to Dr. Dodge's October 29, 1997 medical report, Mr. Burt stated at that time that his lower back was actually feeling quite well. RX-12, p. 43. According to Dr. Dodge's July 17, 1998 report, Mr. Burt at that time denied any lower back pain. RX-13, p. 52. In his February 2001 visit with Dr. Dodge, Mr. Burt did not report any lower back pain, telling Dr. Dodge that the only complaint he had was some soreness on the left side of his neck and left shoulder. TR. 64; RX-14, p. 58. Furthermore, Dr. Towne, the medical expert testifying on behalf of Mr. Burt, testified that Mr. Burt had never complained to him of any lower back pain. CX-8, p. 40. Both Dr. Dodge and Dr. Towne agree that Mr. Burt does not have any permanent disability in his lower back. CX-8, p. 40; RX-12, p. 44, 48; RX-13, p. 54; RX-14, p. 64, 65. Given the medical testimony indicating that there is no disability in Mr. Burt's lower back, the Court finds Mr. Burt is not entitled to any disability benefits for his lower back.

Permanent Disability for the April 4, 1997 Incident

With respect to Mr. Burt's injuries relating to his April 4, 1997 fall, both Dr. Dodge and Dr. Towne agree that Mr. Burt reached maximum medical improvement in October 1997. CX-3, p. 8; CX-8, p. 31; CX-9, p. 2; RX-15, p. 68; RX-21, p. 17-18, 55. For the reasons that follow, the Court finds Mr. Burt is not entitled to any permanent disability benefits for his April 4, 1997 injuries.

1.

In Brooks v. Newport News Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992), aff'd, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993), the claimant suffered a work-related injury but continued to work for his employer in a light duty position. 26 BRBS at 2. The claimant was then fired from the light-duty position for falsification of company records, a legitimate company reason unrelated to his industrial injury. Id. The Benefits Review Board first held that because the claimant did light-duty work for the employer, the employer was relieved of the burden of demonstrating the existence of suitable alternate employment. Brooks, 26 BRBS at 6. The Board then went further stating, "because claimant's inability to perform the post-injury job at employer's facility...was due to his own misfeasance in violating a company rule, any loss in his wage-earning capacity thereafter is not compensable under the Act inasmuch it is not due to claimant's disability resulting from the work-related incident." Id. Having so ruled, the Board concluded it was

unnecessary to evaluate, *inter alia*, the claimant's arguments for partial disability. Id. The Fourth Circuit reviewed the case and affirmed the reasoning of the Board. Brooks, 2 F.3d at 66, 27 BRBS at 102 (CRT).

In this case, Mr. Burt likewise suffered an employment-related injury and continued to work for NASSCO doing suitable light-duty work. Also, Mr. Burt was likewise terminated for reasons unrelated to his industrial injuries. Shortly after his April 4, 1997 fall, Mr. Burt tested positive for marijuana use and was placed in NASSCO's Employee Assistance Program, a program to assist NASSCO employees that have issues in safety and performance. TR. 45, 149-50. About one year later, he tested positive for alcohol use and was terminated for that reason. TR. 44, 150. Mr. Burt contested the fairness of his termination at the hearing, contending that he was misled and was not given notice that alcohol use was a grounds for termination.⁹ TR. 45-48, 161-70. Although Mr. Burt asserts he was unfairly terminated because he was not given proper notice, Mr. Burt did not assert nor did he present evidence that the reason for his firing was somehow linked to his industrial injuries, which is the relevant question under Brooks. The Court finds his termination for alcohol use was a legitimate company reason unrelated to his industrial injuries. Therefore, as in Brooks, because Mr. Burt's termination from his light-duty work at NASSCO was due to his own malfeasance in violating company policy, any loss in his wage earning capacity is not compensable. Furthermore, according to Brooks, it is unnecessary to evaluate Mr. Burt's prospects for partial disability benefits.

2.

The Court shall go further, however, finding Mr. Burt is not disabled under § 2(10) of the Act with respect to his April 4, 1997 injuries because he has failed to prove any loss in wage earning capacity due to those injuries. Dr. Dodge testified that Mr. Burt has no disability in his cervical spine and can return to work as a shipfitter at NASSCO. RX-12, p. 44; RX-13, p. 54; RX-14, p. 65; RX-21, p. 18, 19, 23, 30-32. Dr. Dodge formed his opinion based on the fact that Mr. Burt's physical exams were generally normal, that Mr. Burt is neurologically normal, and that there is essentially nothing in the way of objective findings to support Mr. Burt's subjective complaints, aside from an MRI revealing some mild degenerative disc disease. RX-21, p. 18, 32. Regarding the MRI, Dr. Dodge testified that there is no evidence of a disc herniation or anything else that would be worrisome and that the MRI results were a very common finding in someone Mr. Burt's age. Id.

Dr. Dodge's testimony that Mr. Burt can return to work as a shipfitter at NASSCO. is contradicted by Dr. Towne's testimony. Dr. Towne testified that because of mild to moderate cervical spondylosis with some disc bulging, Mr. Burt cannot work as a shipfitter at NASSCO because he could be a danger to himself and others. CX-8, p. 11-12. Dr. Towne described Mr. Burt's disability as a preclusion from repetitive motions of the neck, which contemplates Mr. Burt lost approximately 50% of his pre-injury capacity for flexing, extending, bending, and rotating his

⁹ Mr. Burt never filed a grievance contesting his termination, despite the fact he had such a right under his collective bargaining agreement with NASSCO. TR. 104-05, 151.

neck. CX-8, p. 11; CX-9, p. 4. Dr. Towne testified that frequent neck bending and twisting could further aggravate Mr. Burt's condition by possibly causing disc herniation and irritation of the surrounding nerves. CX-8, p. 14.

Having reviewed the testimony and reports of both doctors, the Court is more persuaded by Dr. Dodge's testimony. First, the Court finds Dr. Dodge's opinion concerning Mr. Burt's cervical condition more informed and reliable. The doctors do not disagree in their opinions of Mr. Burt's neurological, x-ray, and MRI results. Both doctors agree Mr. Burt's neurological tests are normal. CX-8, p. 35-36; RX-21, p. 24, 32. Both doctors found x-rays of Mr. Burt's cervical spine to be negative. CX-8, p. 29-31; CX-9, p. 1; RX-21, p. 13, 24. Both doctors found the MRI results revealed mild to moderate cervical spondylosis with disc bulges at C3-4, C4-5, and C5-6, without cord or nerve root impingement. CX-8, p. 11; CX-9, p. 3; RX-13, p. 53; RX-14, p. 60; RX-21, p. 20. The doctors disagree only on the clinical significance of the MRI results.

Dr. Dodge opined that the MRI results were not clinically significant because the results are a common finding in someone Mr. Burt's age, are not the kind of disc abnormality that would cause disabling-type pain, and because an individual with such a condition can usually return to normal employment without difficulty. RX-21, p. 20-21. Dr. Dodge testified that degenerative disc disease, the kind of arthritis Mr. Burt has, is essentially something everyone gets. RX-21, p. 67. He testified that studies indicate 30% of the population in their 30's will exhibit disc bulges and more significant herniations on MRI scans, even if they have no symptoms. RX-21, p. 36. For individuals in their 40's, there is about a 40% chance of exhibiting an abnormal MRI scan with bulges and herniations, even though the individuals are asymptomatic. Id.

Dr. Towne was aware of studies indicating that some asymptomatic individuals in the general population will nevertheless show disc bulges on MRI scans, but he was not cognizant of the actual percentages. CX-8, p. 22. In light of Dr. Dodge's testimony and the MRI studies, Dr. Towne did not persuade the Court that Mr. Burt's MRI results were any more clinically significant than the results frequent for a large percentage of the general population. In addition, Dr. Towne's testimony did little to refute the fact that Mr. Burt's condition is common for someone his age, as indicated by Dr. Dodge. Dr. Towne testified that in addition to the MRI findings, he relied on a finding of residual pain with Mr. Burt. CX-8, p. 22. However, Mr. Burt's credibility is suspect, and the Court is reluctant to ratify Dr. Towne's reliance on information derived intricately from Mr. Burt's subjective assertions of pain. As indicated by Dr. Dodge, aside from the MRI results the Court has just discussed, there is little in the way of objective findings¹⁰ to support the conclusion that Mr. Burt is unable to return to his job as a shipfitter at NASSCO. Dr. Dodge's testimony is also more persuasive because Dr. Dodge is more familiar with the position of a shipfitter at NASSCO. Dr. Dodge has been to the NASSCO shipyard during work hours and has observed shipfitters working.

¹⁰ Dr. Dodge testified that a muscle spasm when observed is an objective finding and that he observed a muscle spasm with Mr. Burt in August 1997. RX-12, p. 40; RX-21, p. 53-55. The Court finds this occurrence is of little significance because it was singular in nature and it occurred early on before Mr. Burt became permanent and stable.

RX-21, p. 28. Dr. Towne on the other hand has been to the NASSCO shipyard only as a visitor and has never observed shipfitters at work. CX-8, p. 20. Dr. Dodge had reviewed a job analysis for a shipfitter at NASSCO on numerous occasions while Dr. Towne had never reviewed a position description nor job analysis for a shipfitter at NASSCO. RX-21, p. 28. Furthermore, Dr. Towne did not even review the RU-91 employee job description, RX-10, until a month before his deposition. CX-8, p. 21.¹¹ In concluding that Mr. Burt was unable to work as a shipfitter at NASSCO, Dr. Towne relied on Mr. Burt's own description of his physical duties as a shipfitter. CX-8, p. 38. Having already discussed the credibility problems with Mr. Burt, specifically regarding his description of his job duties, the Court finds Dr. Towne's medical conclusion is weakened by the reliance on Mr. Burt for information regarding the job duties of a shipfitter at NASSCO.

Dr. Dodge also has more experience with evaluating neck injuries than Dr. Towne. Dr. Dodge testified that about 95% of his practice dealt with neck and back injuries and that he sees at least as much arthritis of the spine as any physician in San Diego. RX-21, p. 6, 84. Dr. Towne's practice on the other hand deals with everything from head to toe. CX-8, p. 19. Dr. Dodge performs about 400 spine operations a year. RX-21, p. 6. Dr. Towne has not performed neck surgery as the primary surgeon since his residency over 31 years ago. CX-8, p. 17-18. Dr. Dodge completed a spinal injury fellowship in 1986 while Dr. Towne never participated in a spinal fellowship.¹² RX-21, p. 5; CX-8, p. 19. About 30 to 40% of Dr. Dodge's practice involves treating patients outside of workers' compensation claims and litigation. RX-21, p. 7. Dr. Towne, on the other hand, does not have a clinical practice where he treats patients not involved in workers' compensation or litigation. CX-8, p. 18.

Aside from having more experience with neck injuries, Dr. Dodge has examined Mr. Burt more than Dr. Towne has. Dr. Dodge examined Mr. Burt nine times, beginning in April 1997. RX-21, p. 11-12. Dr. Towne examined Mr. Burt only four times, beginning in September 1997. CX-8, p. 6, 23.

Furthermore, Joyce Gill, a vocational expert familiar with the shipfitter position at NASSCO, testified that Mr. Burt is able to work as a shipfitter at NASSCO even with Dr. Towne's work restrictions. TR. 196. In evaluating what Dr. Towne's restriction against "heavy work" meant, Ms. Gill referred to the definition of "heavy work" given by both the Workers' Compensation Laws of California and the U.S. Department of Labor.¹³ TR. 214-15. Based on his medical report of

¹¹ Dr. Towne's deposition was taken over a month after the courtroom hearing.

¹² A fellowship is a period of time in which an individual does specific work and surgery on an area of concern. CX-8, p. 20.

¹³ Ms. Gill testified the Workers' Compensation Laws of California defines a disability precluding heavy work as: "Thirty percent, contemplates the individual has lost approximately 1/2 of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, or climbing, or other activities involving comparable physical effort." She testified the

February 20, 2002, Dr. Towne apparently was referring to the definition of heavy work under the California Workers' Compensation Laws. CX-9, p. 4. Therefore, Ms. Gill's assessment of Mr. Burt's capacity to work included the proper meaning of "heavy work" as used by Dr. Towne. Given her vocational expertise and familiarity with the duties of a shipfitter at NASSCO, the Court affords some weight to Ms. Gill's opinion also.

SUITABLE ALTERNATIVE EMPLOYMENT AND AVERAGE WEEKLY WAGE

Having determined that Mr. Burt is not entitled to any disability benefits for both the April 4, 1997 and October 1, 1997 incidents, the Court need not address the issue of whether NASSCO has proven the existence of suitable alternative employment in connection to those injuries. Likewise, the Court need not address the issue of Mr. Burt's average weekly wage with respect to those injuries.

SECTION 8(J) OBLIGATION TO REPORT EARNINGS

In this case, NASSCO asserts Mr. Burt failed to timely report his earnings after NASSCO had made a request for such information pursuant to § 8(j). Because the Court has denied Mr. Burt of disability benefits, the § 8(j) issue is moot and will not be addressed by the Court.

SECTION 8(F) SPECIAL FUND RELIEF

NASSCO had contended that if Mr. Burt were awarded permanent disability benefits, then relief under § 8(f) should be awarded to NASSCO. Because the Court is not making an award of permanent disability benefits, § 8(f) is inapplicable to this case.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

- (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary

U.S. Department of Labor's definition of heavy work is: exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 lbs of force frequently, and/or 10 to 20 lbs of force constantly to move objects. TR. 216-17.

for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The Fourth Circuit held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g, 6 BRBS 550 (1977).

Having determined that Mr. Burt suffered employment-related injuries to his neck, left shoulder, and lower back, the Court finds that Mr. Burt is entitled to reasonable and necessary medical benefits due to those injuries. Mr. Burt testified that he is currently receiving anti-inflammatory and pain medication from the Veterans Affairs Hospital. TR. 40-41, 81-82. Dr. Towne opines that Mr. Burt may require analgesic and/or anti-inflammatory medications as his symptoms require and should be afforded physical therapy and/or chiropractic treatment for flareups of neck pain. CX-9, p. 4. Although expounding that Mr. Burt has reached a plateau in terms of medical treatment, Dr. Dodge's testimony suggests Mr. Burt may benefit from supportive care, such as anti-inflammatory type medication. RX-21, p. 56. The Court construes the foregoing evidence as an indication that reasonable and necessary medical treatment may be required in connection with Mr. Burt's work-related injuries. Therefore, Mr. Burt is entitled to any reasonable and necessary past and future compensable medical benefits associated with his work-related injuries.

ATTORNEY'S FEES

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution, the claimant is entitled to an attorney's fee payable by employer. See 33 U.S.C. § 928(a); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises

over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. See 33 U.S.C. § 928(b); Moody, 27 BRBS at 176.

For cases of partial or limited success, the award of attorney's fees should be reasonably tailored in relation to the results obtained. Ingalls Shipbuilding, Inc. v. Director, OWCP, 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT) (5th Cir. 1993); Hensley v. Eckerhart, 461 U.S. 424, 440; 103 S.Ct. 1933, 1943; 76 L.Ed. 2d 40 (1983). The Supreme Court has noted that in partial or limited success cases, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may result in an excessive amount. Hensley v. Eckerhart, 461 U.S. at 436; 103 S.Ct. at 1941; Ahmed v. Washington Metro. Area Transit Auth., 27 BRBS 24, 27 (1993). There is no precise rule or formula; a court may address such cases by eliminating hours or simply reducing the award. Hensley, 461 U.S. at 436-437, 103 S.Ct. at 1941; Ahmed, 27 BRBS at 27. "Success" of an action under Hensley is not measured in terms of the monetary amount awarded, but rather in terms of how successful the plaintiff was in achieving the claims asserted. Bullock v. Ingalls Shipbuilding, Inc., 27 BRBS 90, 96 (1993). In cases under the Longshore Act, moreover, while the amount of benefits awarded is a relevant factor in determining the attorney's fees award under 20 C.F.R. § 702.132(a), a claimant's success must also be measured against the amount of benefits voluntarily paid by employer. Bullock, 27 BRBS at 96; Rogers v. Ingalls Shipbuilding Inc., 28 BRBS 89, 92 (1993).

Claimant in the present case is receiving an award only for medical benefits. Therefore, the Court will consider claimant's limited success in awarding attorney's fees in this case.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

- 1) Respondent shall pay Claimant for all reasonable and necessary past and future medical expenses, consistent with this opinion, resulting from the work-related injuries to his neck, left shoulder, and lower back on April 4, 1997 and October 1, 1997; and
- 2) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge